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Supreme Court, U.S.
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No. 03-1279

In The
Supreme Court of the United States

ANDRE A. FOREMAN,

Petitioner,

v.

CHARLES D. GRIFFITH, JR., BERNARD A. PISHKO, CALVIN R. DEPEW, and CITY OF NORFOLK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. For purposes of 42 U.S.C. § 1983, does petitioner, a former Deputy City Attorney, state a claim for deprivation of liberty without due process against his employer, the City and its City Attorney, who, without a public hearing, reassigned petitioner to the position of Assistant City Attorney and reduced his pay in accord with his lesser responsibilities, merely because petitioner also alleges that his reassignment was a result of his having been earlier maliciously defamed not by the City, City Attorney or any other City employee or officer, but rather by a separate and independent officer, the Commonwealth's Attorney, over whom the City and City Attorney have no control and for whom they have no legal responsibility?

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INTRODUCTION

Both the Question Presented and the Statement of the Case, as presented by the petitioner Andre A. Foreman (hereinafter "Foreman"), are less than complete in setting out the precise basis upon which Foreman seeks to pursue a § 1983 claim against his former employer and his ultimate supervisor, the City of Norfolk, Virginia (hereinafter "City") and its City Attorney, Bernard A. Pishko (hereinafter "Pishko"), respectively. It is to be regretted that Foreman has crafted the Question Presented and the Statement of the Case in this fashion, apparently deliberately to obscure the distinction between the different actors and different governments about whose acts he complains. To that end, it is necessary to set out in greater length than should have been necessary the Statement of the Case, including the factual allegations offered by Foreman in support of his own position.

As will be seen below, once Foreman had completed amending and revising his pleadings, and voluntarily dismissing certain claims, he was left to complain that he was maliciously defamed by a report authored and published by the defendant Charles D. Griffith (hereinafter "Griffith"), the local prosecutor for state charges, then Commonwealth's Attorney for the City of Norfolk, an elected position established and made independent by the Virginia Constitution, and separate and apart from and not subject to the control of the Norfolk city government. Not only did Foreman abandon claims that he was defamed by the City and Pishko, Foreman asserted that Griffith's maliciousness and knowing publication of falsehoods was proved by statements attributed to the City and Pishko which indicated that, notwithstanding Griffith's allegedly defamatory report, the City and Pishko determined that

there was no wrongdoing by Foreman. Rather than having an *Owen*[1]-like claim for injury to a liberty interest as a result of what "the government" did to him (in *Owen*, a police chief was allegedly defamed by City Council resolution and statements, *and* then discharged by the City Manager), Foreman complains that he was demoted by the City and Pishko as a result of the defamation by Griffith, an official of an entirely separate and independent government whose acts the City and Pishko were absolutely helpless to control, dictate or direct. Furthermore, the City under Virginia law is not able to effect any discipline whatsoever upon the Commonwealth's Attorney for any acts of misconduct he or she may have performed. If Foreman has been maliciously defamed by Griffith, his remedy is to seek compensation for the damages which accrued him from that allegedly malicious defamation. Foreman's then employer and ultimate supervisor did not, however, under any recognized precedent of this Court, deprive Foreman of his liberty interest, in violation of due process, even if they reassigned him and reduced his pay as a result of the alleged defamation by another.

STATEMENT OF THE CASE

1. Foreman was, at all times pertinent, either a Deputy or Assistant City Attorney in the Office of the City Attorney for the City of Norfolk, which office was presided over by City Attorney Pishko. (Amended Motion for Judgment, hereinafter "AMJ," ¶¶ 1, 4, at Foreman's Appendix

[1] *Owen v. City of Independence*, 445 U.S. 622, 623 n.13 (1980).

to Petition for Writ of Certiorari, hereinafter "Appendix," p. E-2).

2. The defendant City of Norfolk is an incorporated municipality of the Commonwealth of Virginia. (AMJ, ¶ 6, at Appendix, p. E-3).

3. Griffith was, at all times pertinent, Commonwealth's Attorney for the City of Norfolk (AMJ, ¶ 2, at Appendix, p. E-3). The position of Commonwealth's Attorney is an independent elected position having no connection to the government of the City or County in whose geographic limits the powers of the Commonwealth's Attorney are executed. (Va. Const., Art. VII, § 4, and cases interpreting that provision.) At no time was Foreman an employee of the Commonwealth's Attorney or his office. (Appendix, pp. E-76 to E-77.)

"4. The genesis of this case" was an investigation by the Norfolk Police Department and Griffith of, *inter alia*, the role of Foreman in award and execution of a City towing contract (AMJ, ¶ 8, at Appendix, p. E-3), which resulted in a report authored by Griffith (AMJ, ¶ 9, at Appendix, p. E-3). Foreman asserts that the report was published by Griffith and was "massively defamatory" of him. (Petition for Writ of Certiorari, hereinafter "Petition," p. 4, ¶¶ 2 and 4, relying on AMJ, ¶¶ 10, 11, 14, 15 and 16.)

5. "Respondent Griffith's report falsely and maliciously maintained that [Foreman] was guilty of reprehensible, unethical, and dishonest conduct and favoritism . . . in the award of a city towing contract." (Petition, p. 4, ¶ 3, relying on AMJ, ¶ 14.)

6. Although in Foreman's Amended Motion for Judgment it was asserted that Pishko, among others, published

and republished defamatory statements by publishing the report, and knowing its falsity, relied upon the report to demote Foreman, the pleadings, as later amended, and exhibits initially attached, repudiated those assertions. Thus in his More Definite Statement entered on August 12, 2002, Foreman moved the Court to dismiss defamation counts against all defendants other than Griffith "in light of the concession by Griffith's counsel . . . that Griffith was the one who published his report." (Plaintiffs' More Definite Statement, at Appendix, p. F-2) (filed in civil actions of Foreman and another, consolidated by the district court).

7. Further, in the same More Definite Statement, Foreman asserted that Pishko, rather than agreeing with Griffith's report, "found no wrongdoing exposed in Griffith's report" and told that to a newspaper in explaining Foreman's reassignment. (Plaintiffs' More Definite Statement, at Appendix, p. F-20.)

8. Exhibit B to the Amended Motion for Judgment, expressly referenced in the More Definite Statement, and attached here as a Supplemental Appendix to this Brief in Opposition to Petition for Writ of Certiorari, is a newspaper article on Foreman's reassignment in which it is reported that Pishko said that he determined that no wrongdoing occurred, and that "It's a question of appearance. . . . What I was handed was not something unequivocal. . . . Given that report, [Foreman] working with the police or the commonwealth's attorney's office would present some issues, and the social services work [to which he was reassigned] takes him out of that area." In the same newspaper article, Norfolk City Manager Regina Williams was quoted as saying that "I didn't find that anyone had acted inappropriately. . . . What you had was a

difference of opinions, not anyone ignoring something."[2] (Supplemental Appendix herein, at pp. A-3 to A-4.)

9. Although in his More Definite Statement, Foreman alleged that his "demotion" was "[i]n connection with Griffith's release of the defamatory report" (Appendix, pp. F-22 to F-23), the alleged defamatory report was dated March 27, 2000 (Appendix, p. E-16), and the City Attorney's reassignment was announced on April 5, 2000, according to Exhibit B to the Amended Motion for Judgment. (Supplemental Appendix herein, at p. A-1.) Pishko is reported therein to have said that his decision was based upon having conducted "his own review since receiving Griffith's report, including interviewing Foreman, Summs and city officials involved in the contract discussions."

10. Although Foreman asserts that he was "demoted," the same newspaper article attached as an exhibit to Foreman's Amended Motion for Judgment reports Pishko as having indicated that Foreman had been "reassigned" but would "go to work as a full-time attorney for the city's Department of Human Services, and that his pay had been

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[2] The newspaper article of April 5, 2000 was the only exhibit to Foreman's Amended Motion for Judgment that was not made a part of the Appendix to Foreman's Petition for Writ of Certiorari. It was also the only such exhibit omitted from the Joint Appendix filed in the court of appeals, despite the request by the City and Pishko that it be included. A Supplemental Joint Appendix was necessarily filed in the court of appeals as a result. For purposes of a review of a Rule 12(b)(6) dismissal, the factual background includes the exhibits attached to or referenced in an initial pleading. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990), *Gasner v. County of Dinwiddie,* 162 F.R.D. 280, 282 (E.D.Va. 1995), *aff'd*, 103 F.3d 351 (4th Cir. 1996).

reduced because the new job carried fewer responsibilities." (Supplemental Appendix herein, at p. A-3.)

11. Subsequent to the events described in the pleadings, Foreman voluntarily resigned his employment with the City.

ARGUMENT

I. FOREMAN DOES NOT ASSERT A VALID § 1983 CLAIM FOR VIOLATION OF HIS LIBERTY INTEREST WITHOUT DUE PROCESS BY VIRTUE OF HIS HAVING BEEN REASSIGNED BY HIS EMPLOYER.

At the outset, it must be remembered that the municipal defendants, the City of Norfolk and its City Attorney Pishko on the one hand, and the defendant Griffith, Commonwealth's Attorney for the City of Norfolk, on the other hand, are independent of and unrelated to each other. They are not arms of the same government, but are different entities altogether. The division in Virginia between a municipality and its Commonwealth's Attorney is long established and clear. "Because of the need for a Commonwealth's Attorney to be able to exercise unfettered discretion in performing his duties, the Commonwealth's Attorney, like the sheriff, is independent of municipal or county and state governments. It follows, then, that these entities can exert no control over the actions of persons elected and occupying positions as constitutional officers." *City of Virginia Beach v. Commonwealth*, 19 Va.Cir. 283, 285 (1990), citing *Sherman v. City of Richmond*, 543 F.Supp. 447 (E.D.Va. 1982); *see also Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151 (1957); Va. Const. Art. VII § 4. This distinction is critical, fatal to Foreman's

liberty interest claim, and not only ignored by Foreman, but attempted to be swept under the rug when Foreman attempts to take advantage of cases which talk about what "the government" did to its employee-plaintiff.

Throughout these proceedings, petitioner relies upon footnote 13 in this Court's decision in *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980). Foreman asserts that his liberty interest claim fits footnote 13 in *Owen* "like a glove." (Plaintiffs' More Definite Statement, at Appendix, p. F-23.) It is submitted here, however, that it fits like a big round peg in a small square hole – not at all. The discharged employee in *Owen* was discharged by the City the day after the employee was accused of criminal and other misconduct by a City Council member during a public City Council meeting, at which meeting the Council passed a resolution to publish a police investigative report of the employee and his office, and directed the City Manager to take "all direct and appropriate action" against persons revealed by the report to have been involved in illegal and wrongful misconduct. Here, petitioner asserts that he was defamed not by any City Council, City Manager or even City Attorney, but rather by the Commonwealth's Attorney, as demonstrated above, a separate, independent, state constitutional officer. Here, Foreman asserts that statements made by the City Attorney and the City Manager are so favorable to his position, and at odds with the conclusion of Griffith in his report, that those statements by the City and Pishko support his conclusion that Griffith's report was not only false, but malicious. (Appendix, pp. F-20 to F-21.) Due process requires a hearing on the discharge of a government employee "if the *employer* creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (*per curium*) (emphasis

added). Foreman's own pleadings, as amplified by his More Definite Statement, recite that the false and defamatory impression about which he complains was created and disseminated exclusively by Griffith, not by Pishko or the City.[3]

In briefs filed below, Foreman characterizes the arguments made by Pishko and the City, as well as the ruling of the district court, as depending upon the assertion that the defendants responsible for the derogatory remarks and actions were "different." Foreman goes on to assert that such a position is inconsistent with *Owen v. City of Independence*, 445 U.S. at 633 n.13, arguing that the footnote upon which he relies stands for the proposition that a § 1983 due process-liberty interest claim can be made even when the entity causing damage to reputation or standing in the plaintiff's community is different from the entity taking the adverse employment action. In *Owen v. City of Independence*, however, there were not different legal entities involved, but rather at best, different agents (the City Manager, the City Council and one of its members) of one entity, the City of Independence.

Indeed, the Court of Appeals for the Fourth Circuit, in *Stone v. University of Maryland Medical System*, 855 F.2d 167 (4th Cir. 1988), summarized the decisions of this Court governing due process-liberty interest violations in connection

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[3] Ironically, dealing in an area of jurisprudence where it is beyond dispute that defendants may not be made liable under *respondeat superior* or vicarious liability theories, Foreman would impose liability on the City and Pishko for the intentional acts (alleged maliciously publication of a "massively defamatory" report) of not even a subordinate employee but rather a separate governmental official, the Commonwealth's Attorney, Griffith.

with employment decisions, and that summary clearly indicates how ill-fitted the precedent upon which Foreman purports to rely is with respect to the case he presents. Thus the court of appeals has said that, in order to state a claim for violation of due process-liberty interest, a plaintiff-employee:

> would have to allege facts tending to show that his superiors made charges against him that "might seriously damage his standing and associations in his community" or otherwise "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," *Board of Regents v. Roth*, 408 U.S. 564, 573-75, 92 S.Ct. 2701, 2707-08, 33 L.Ed.2d 548 (1972); that those charges were made "public" by his employer, *Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976); and that the charges were false, *see Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 883, 51 L.Ed.2d (1977).

Stone v. University of Maryland Medical System, 885 F.2d 164, 178 n.5 (4th Cir. 1988). The court of appeals further said that "the clear implication from *Paul v. Davis*, 424 U.S. 693, 710-11 (1976), is that a public employer's stigmatizing remarks do not deprive an employee of a liberty interest unless they are made in the course of a discharge or significant demotion." *Id.*[4]

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[4] As the court of appeals noted in its decision below, the portion of this quotation from *Stone* which speaks to "significant demotion" was *dicta* which was later squarely rejected by the same court of appeals in *Johnson v. Morris*, 903 F.2d 996 (4th Cir. 1990). The quotation here is repeated to highlight that the employer here did not make the allegedly false stigmatizing remarks nor were they made by the employer in the course of an employment decision.

Foreman's claim obviously must fail when judged by this standard. Foreman, formerly a City employee, does not allege serious charges made against him *by his superiors*. Rather, he complains of defamation by the then Commonwealth's Attorney, who is not even a fellow employee of Foreman's, or any employee of the City, let alone Foreman's superior at the time. The only remarks attributable to Pishko, the City Manager or any City employee are remarks considered by Foreman to be so favorable to him that he offers them in his More Definite Statement as proof for the proposition that Griffith's statements were made with malice. Further, the charges of which he complains (again, those made by Griffith) were not made "public" by his employer, the City of Norfolk. Rather, Foreman has abandoned any claims he might previously have made of publication of those charges by others than Griffith. Moreover, the allegedly stigmatizing remarks of the employer must be made in the course of the employment decision. Again, the only remarks attributable to Pishko are those set out in an April 5, 2000, newspaper article, which is part of Exhibit B to the Complaint, in which Pishko reportedly said, in conjunction with reassigning and reducing the pay of Foreman, that he had "determined that no wrongdoing occurred. It's a question of appearance . . . What I was handed was not something unequivocal . . . Given that report, [Foreman] working with the police or the commonwealth's attorney's office would present some issues, and the social services work takes him out of that area." Complaint, Exhibit B, *Virginia Pilot* article "City Attorney Involved with Towing Deal is Reassigned, dated April 5, 2000; Supplemental Appendix, at p. A-3. Likewise the City Manager is not alleged to have made any stigmatizing remarks about petitioner Foreman.

If petitioner is really able to prove what he says he is alleging, that Griffith maliciously defamed him and as a result, caused not only a demotion and loss in pay, but also denied Foreman a judgeship and other appointments, then Foreman may be entitled, under state law, to recover damages from Griffith for that malicious defamation. It does not follow, however, that the City and Pishko violated Foreman's constitutional rights, and specifically deprived him of liberty interest without due process of law, by reassigning him as a result of the allegedly malicious defamation effected by someone else for or with whom the City and Pishko are not legally or otherwise responsible or connected.

II. TO THE EXTENT THAT THERE IS A CONFLICT BETWEEN THE COURTS OF APPEALS AS TO THE EXTENT OF THE ADVERSE EMPLOYMENT ACTION WHICH MUST BE TAKEN BY AN EMPLOYER IN CONNECTION WITH DEFAMATION OR STIGMATIZING STATEMENTS BY THAT EMPLOYER BEFORE A DUE PROCESS-LIBERTY INTEREST CLAIM IS IMPLICATED, THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THAT CONFLICT.

As explained above, the circumstances of the separate alleged defamation of Foreman by Griffith, the Commonwealth's Attorney, and the later action by the City, through Pishko, with respect to the employment of Foreman do not implicate due process-liberty interest rights of Foreman. Moreover, even ignoring what is said above, Foreman's reassignment does not qualify as an injury that entitles him to claim deprivation of his liberty. There is no question that Foreman was not discharged. *See*, *Paul v. Davis*, 424 U.S. 693, 710 (1976) (cited and quoted in footnote 13 in *Owen v. City of Independence*, analyzing *Board of*

Regents v. Roth, 408 U.S. 564 (1972) as recognizing that to implicate liberty interests an employer's "defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time [a governmental] employer might be considered responsible for a statement defaming an employee who continues to be an employee.") *See also Johnson v. Morris*, 903 F.2d 996 (4th Cir. 1990), expressly relied upon by the court of appeals below. In order to articulate a claim that an employment decision is so debilitating as to be deemed to have restrained the employee's liberty, an employee must, in effect, argue that he has been made unemployable. It is undisputed that Foreman here remained employed, and thus he cannot even argue that he was effectively denied his liberty to seek employment elsewhere. *Foreman v. Griffith, et al.*, No. 02-2284, (4th Cir. November 17, 2003) (unpublished), at Appendix, pp. A-15 to A-16.

Even assuming, *arguendo*, that Foreman's liberty rights are potentially involved and that something less than a discharge will potentially violate his liberty rights, Foreman's own pleadings make it clear that the reassignment, even if called a "demotion," is by no stretch of the imagination so serious as to constitute an invasion of Foreman's liberty interest. Foreman did not sustain a sufficiently significant demotion so as to trigger constitutional protection under the liberty interest provisions of the due process clause of the Fourteenth Amendment, assuming that a significant demotion would ever trigger that protection. *See Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977) (finding the demotion of police officer from corporal to patrolman did not implicate constitutionally protected liberty interest under the due process clause, but

leaving open the question of whether a demotion from corporal to janitor would implicate a liberty interest). Specifically, the circumstances surrounding Foreman's reassignment within the Office of the City Attorney do not create an issue of constitutional moment. Foreman was still engaged in the practice of law with the City of Norfolk and its subdivisions as his clients. Quite simply, Foreman's position changed from that of Deputy City Attorney to Assistant City Attorney, but he was still employed by the City, and still employed as an attorney in the Office of the City Attorney. It is not unimportant to the stigma analysis under which Foreman asserts he has suffered irreversible damage so great as to affect adversely his liberty that Pishko, in his capacity as City Attorney, chose to retain Foreman as one of his Assistant City Attorneys. Pishko's decision to continue Foreman's employment belies any assertion that the transfer in position has such a stigmatizing effect on Foreman's ability to pursue his chosen profession that it might be likened to an injury to Foreman's own liberty. Rather than stigmatizing him to that extent, the decision to continue his employment, albeit at a different level of responsibility, carried with it the tacit approval of Foreman's ability to perform tasks as an attorney to which Foreman, as a member of the Office of the City Attorney, was to be assigned. While surely the reassignment was not pleasant, in the face of what Foreman asserts was malicious defamation with resulting damage to his reputation, Foreman was at least allowed to take some comfort in the fact that his employer (Norfolk) and ultimate superior (Pishko) although reassigning him, did not terminate him and instead denied that there had been any wrongdoing, notwithstanding the allegedly defamatory report.

Ironically, Foreman's own Petition, in asserting reasons why a writ should be granted (arguing that there is a dispute among the courts of appeals) cites authority further explaining why it is not necessary for this Court to intervene. Foreman cites *Ersek v. Town of Springfield*, 102 F.3d 79 (3rd Cir. 1996), setting out a portion of footnote 5 from that case. Foreman appears to criticize the Court of Appeals for the Third Circuit for neglecting to resolve what Foreman impliedly asserts is a burning disagreement between courts of appeals begging for resolution. Indeed the court of appeals did not neglect to resolve the difference, but like the district court here, did not need to address it, because plaintiff simply could not establish a liberty interest violation even if a demotion, as opposed to a discharge, would satisfy the requirement of adverse employment action.

In *Ersek*, the plaintiff municipal employee was investigated by the police, although never charged. Following that investigation, the Town, unlike the City and Pishko here, released an admittedly false statement, suggesting that the Town Council had been aware of the investigation for a much longer period than was accurate. Like the City and Pishko here, however, the Town did not release a report of the investigation. The court of appeals affirmed the grant of summary judgment to the Town because there was no allegation, nor could there be, that the Town had published false statements which damaged Ersek's reputation. Ersek was denied, by the Town, a new contract with the Town as favorable as the one he had previously enjoyed, but because the harm to his reputation was attributable to false statements not issued by the Town but rather by the police investigating him and/or the newspaper coverage of such investigation, there was no constitutional liberty

interest-due process claim against the Town available to Ersek.

CONCLUSION

In the instant case, notwithstanding a report published by the Commonwealth's Attorney that asserted wrongdoing on the part of Foreman, Foreman was allowed to continue as an employee of the City, indeed allowed to continue as an attorney in the Office of the City Attorney. The City Attorney and the City Manager publicly disagreed with the report's conclusion, and both publicly said they found no wrongdoing by Foreman. Foreman, once he learned that Griffith published the report of which he complains, abandoned a defamation claim against the City and Pishko. Further, Foreman offered statements by Pishko and the City Manager as evidence not only of the falsity of Griffith's report, but also of Griffith's maliciousness in believing that there was wrongdoing when, according to Pishko and the City Manager, they found none. On those allegations, and under the circumstances as alleged in petitioner's pleadings, it is clear that any damage in reputation to Foreman accrues not from allegedly false statements from his employer, but rather despite statements otherwise favorable to Foreman by his employer. Whether or not Foreman was defamed by Griffith, Foreman has no constitutional claim for deprivation of his right to liberty by his employer and ultimate superior, the City and Pishko, in deciding only to reassign but not

terminate Foreman, and not coincidentally, in coming to at least his partial defense.

Respectfully submitted,

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City attorney involved with towing deal is reassigned

Pay also cut in effort to end appearance of any impropriety

BY JON GLASS
STAFF WRITER

4.5.03

NORFOLK – Andre A. Foreman, a longtime deputy city attorney, will be reassigned and receive a substantial pay cut in the wake of an investigation that raised questions about his relationship with a towing company that won an exclusive city contract.

Foreman, a 15-year employee of the city attorney's office, will be relieved of his duties as a deputy attorney and will have $25,000 slashed from his $95,875 annual salary, Foreman's boss, City Attorney Bernard Pishko, said Tuesday.

Foreman will go to work as a full-time attorney for the city's Department of Human Services, primarily handling child welfare cases, Pishko said. He will no longer do legal work on city contracts for goods or services.

"I've made these decisions with much anguish, and I think they're the right things to do," Pishko said in an interview.

Later Tuesday, an attorney representing Foreman and William J. Summs, Tidewater Towing Inc.'s former president, faxed a five-page letter to Pishko asserting that neither had done anything wrong and asking that no action be taken against Foreman involving loss of pay, seniority or benefits.

The attorney, Gil Davis of Fairfax, called Foreman and Summs victims of "innuendo and false accusations" contained in a scathing report released last week by Norfolk's top prosecutor.

Davis blasted the report as "replete with errors, inconsistencies, misconceptions of facts and downright lies."

Chuck Griffith, Norfolk's commonwealth's attorney who recently was named a Circuit Court judge, was out of town Tuesday and unavailable for comment.

In his report, Griffith concluded that Foreman had an "inappropriate relationship" with Summs that, "at a very minimum, created the appearance of preferential treatment" of Tidewater over competitors.

The firm in April 1997 won exclusive rights to tow abandoned and illegally parked cars for the Police Department.

Griffith's report said evidence indicated that Foreman accepted gifts – meals, car repairs, tickets to sporting events and Cuban cigars – from Summs and helped the company win the contract with terms that benefited Tidewater at the city's expense.

But the 39-page report, based on a police investigation that began in 1997, fell short of recommending criminal charges. Foreman was never interviewed by the investigators.

Pishko said Tuesday that he had conducted his own review since receiving Griffith's report, including interviewing Foreman, Summs, and city officials involved in

the contract discussions. Pishko said he determined that no wrongdoing occurred.

"It's a question of appearance," Pishko said. "What I was handed was not something unequivocal."

Given that, Pishko said he decided not to fire Foreman, but instead to relieve him of his duties as a deputy city attorney. Pishko said he reduced Foreman's pay because the new job in Human Services carried fewer responsibilities.

Pishko said Foreman no longer would work closely with city police officers or the commonwealth's attorney.

As a deputy city attorney, Foreman handled criminal prosecutions, heading the city's vice and prostitution team, and he worked on civil litigation and Alcoholic Beverage Control cases – all of which required a close relationship with police. In recent years, Foreman had been mentioned as a possible candidate for a local judgeship.

"Given the report, Andre working with the police or the commonwealth's attorney office would present some issues, and the social services work takes him out of that area," Pishko said.

City Manager Regina V.K. Williams, who reviewed the actions of other city employees involved in the contract discussions, said Tuesday that no one else would be disciplined.

The issue was complicated because the city was trying to save money by consolidating three towing contracts into one, resulting in internal disagreements over who could best provide the service, Williams said.

Griffith's report, for example, noted that Police Chief Melvin C. High had overruled the objection of top officers and followed Foreman's counsel to hire Tidewater.

"I didn't find that anyone had acted inappropriately," Williams said. "What you had was a difference of opinions, not anyone ignoring something."

The city plans to terminate its contract with Tidewater Towing when it expires April 30 rather than extend it as the terms allow.

Williams said Tuesday that Norfolk is putting together an interim plan to have the city's Public Works Department provide towing for the Police Department while officials reassess how best to proceed.

"I believe there are other ways of providing more [illegible] checks and balances," Williams said.

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